UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

David Lane Johnson, Plaintiff, -v- National Football League Players Association, et al., Defendants.	No. 1:17-cv-05131 (RJS) Judge Richard J. Sullivan

Plaintiff David Lane Johnson's Memorandum of Law in Opposition to Defendant NFLPA's Motion to Dismiss

Zashin & Rich Co., L.P.A.
Stephen S. Zashin (NY #4594305)
ssz@zrlaw.com
Patrick J. Hoban (OH #0079794)*
pjh@zrlaw.com
David R. Vance (OH #0083842)*
drv@zrlaw.com
950 Main Avenue, 4th Floor
Cleveland, OH 44113
Telephone: (216) 696-4441
Facsimile: (216) 696-1618
** admitted pro hac vice*

Attorneys for Plaintiff, David Lane Johnson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Defendant the National Football League Players Association ("NFLPA") contests Plaintiff David Lane Johnson's claims because the NFLPA knows it has blood on its hands. Rather than address the litany of misconduct Johnson detailed in his First Amended Complaint ("FAC") (Doc. No. 39), the NFLPA attacks Johnson -- the NFLPA's own member.

The National Football League and the National Football League Management Council (together the "NFL") disciplined Johnson under the NFL Policy on Performance-Enhancing Substances 2015 ("Policy") (Doc. No. 39-1). Johnson appealed his discipline, and a deeply flawed arbitration process led to an erroneous arbitration award ("Award"). The NFLPA hides behind the illegitimate Award, which is, in no small part, traceable to the NFLPA's misconduct.

From the instant Johnson appealed his discipline, the NFLPA abandoned the express Policy terms it collectively bargained with the NFL. Johnson uncovered numerous instances in which the NFLPA disregarded Policy provisions intended to protect players like him and allowed the NFL to run roughshod over the Policy without as much as a peep.

The NFLPA avoids any mention of the secret Policy "amendments," the illegitimacy of the process that produced them, or its stalwart refusal to provide them to Johnson. Furthermore, while this is the third iteration of the NFLPA's Motion to Dismiss (*see* Doc. No. 26, Doc. No. 50, and Doc. No. 109), the NFLPA has yet to offer evidence its members approved or ratified any of the claimed amendments as its Constitution required. No NFLPA member in good conscience would do so, as the "amendments" gutted the bargained-for player protections.

The NFLPA's misconduct denied Johnson his express Policy rights to a minimum pool of three neutral arbitrators unaffiliated with the NFL, NFLPA or NFL clubs and a neutral and independent review of his allegedly positive Policy test result. The NFLPA routinely refused to

assist Johnson's efforts to obtain information critical to his appeal including lab testing protocols and Johnson's Policy testing records, which the NFLPA's agents possessed. The NFLPA's violation of its Constitution to allow Policy changes detrimental to Johnson amply demonstrates Johnson's standing to bring his claims, which he properly stated against the NFLPA.

The NFLPA rightly is concerned this case will expose its misconduct. The NFLPA's staggering "blame the victim" strategy rests solely on a baseless contention that Johnson "admitted" a Policy violation. As Johnson pled, the Policy required that the neutral Chief Forensic Toxicologist ("CFT") -- Dr. Bryan Finkle -- certify the positive test as a condition for the NFL to discipline Johnson. The NFLPA's misconduct ensured this required certification did not occur. As a result, and regardless of Johnson's purported statements, no positive Policy test and no legitimate grounds exist for the discipline or the panoply of Johnson's resulting injuries.

The NFLPA touts the Policy's requirement that Defendants jointly select neutral arbitrators, even asserting that prior to its implementation, "[f]or decades, arbitrators for player appeals…were unilaterally selected by the NFL." Doc. No. 109 at 9. The NFLPA portrayed this as a significant win. Nevertheless, the NFLPA, in violation of the Policy and its Constitution, allowed James H. Carter, a man who previously represented the NFL, whose firm has received millions of dollars from the NFL, and who was otherwise affiliated with the NFL, to serve as a Policy arbitrator and hear Johnson's appeal. Again, it is this fear of exposure that compels the NFLPA to praise Carter so profusely and slam Johnson so remorselessly.

In the end, the NFLPA, the NFL, and the arbitrator simply never applied the Policy. The FAC details specific acts and instances when the NFLPA voided express Policy terms in violation of its Constitution, refused to provide Johnson with critical information in its agents' possession, and otherwise denied Johnson his express Policy rights. The NFLPA has not

controverted these allegations and its effort to avoid liability for its arbitrary, bad faith and, ultimately, discriminatory conduct must fail.

Neither Rule 12(b)(1) nor 12(b)(6) requires Johnson to irrefutably prove his allegations at this stage of the proceeding. Nevertheless and even without discovery, Johnson has demonstrated numerous factual issues that support his claims against the corrupt NFLPA. Accordingly, Johnson respectfully asks this Court to deny the NFLPA's Motion to Dismiss.

RELEVANT FACTS

The "Background" section in the NFLPA's Motion to Dismiss misses the mark. Most significantly, the NFLPA repeated its incorrect assertion that Johnson admitted to violating the Policy. Johnson never did so.

The NFL may discipline players under the Policy for "testing positive" for a prohibited substance or for a "Positive Test Result." Doc. No. 39-1 at 1793-1794.[1] For a positive test to exist, the NFL has the initial burden of proving:

- a positive test result;
- that was obtained pursuant to a test authorized under the Policy; and
- that was conducted in accordance with the collection procedures and testing protocols of the Policy and the protocols of the testing laboratory...

Doc. No. 39-1 at 1799. A positive test result exists only after these three preconditions are met and the neutral CFT verifies and certifies the test result. Doc. No. 39-1 at 1792.

Johnson never admitted that the "test the lab performed was positive," that his "test was authorized under the Policy," that his test was "conducted in accordance with the collection procedures and testing protocols of the Policy," or that the CFT "verified" and "certified" the test result. Rather, Johnson vehemently argued that the NFL met none of these requirements. Doc. No. 52-4 at 2315-2321, 2399 ("I don't agree with the test"), 2566-2572; Doc. No. 109-3.

[1] Johnson cites to the page number in the upper right corner of the filings he cites.

The NFLPA's misconduct enabled the NFL's nullification of express Policy provisions and undermined Johnson's attempt to assert his Policy rights and defend himself:

- The NFLPA, in part, thwarted Johnson's attempt to demonstrate his test was not authorized under the Policy by refusing to obtain his testing history from the Policy's Independent Administrator, the NFLPA's agent, and provide it to Johnson in response to his requests (*see* Doc. No. 39 at ¶¶ 133-134);
- The NFLPA thwarted Johnson's attempt to demonstrate the lab did not follow the Policy's procedures and lab protocols by refusing to obtain the procedures and protocols from the lab, the NFLPA's agent, and provide them to Johnson in response to his requests (*see* Doc. No. 39 at ¶ 132); and
- The NFLPA thwarted Johnson's ability to demonstrate that the CFT never verified or certified the lab's test results, falsely claiming there was a legitimate Policy amendment transferring the neutral CFT test result verification and certification duties to the lab where the tests were performed (i.e., in violation of its Constitution, the NFLPA amended the Policy to allow the fox to the guard the henhouse) (*see* Doc. No. 39 at ¶¶ 95-99, 120, 122).

In support of its untenable position that Johnson admitted to violating the Policy, the NFLPA cites extrinsic evidence, including articles that were published well after Johnson's arbitration concluded. *See* Doc. No. 109 at fn. 2 and fn. 6.

LAW AND ARGUMENT

I. JOHNSON SUFFICIENTLY PLED STANDING

A. Standard of Review -- Rule 12(b)(1)

To demonstrate standing, Johnson must assert "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (*citing Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Johnson must demonstrate: (1) an injury in fact; (2) a causal connection between the injuries and the NFLPA's misconduct; and (3) that it is likely a favorable decision will redress the injuries. *Liu v. N.Y. City Campaign Fin. Bd.*, No. 14-cv-1687, 2016 WL 5719773, *3 (S.D.N.Y. Sept. 29, 2016) (Sullivan, J.) (*citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000)).

A court resolving a motion to dismiss for lack of standing under Rule 12(b)(1) must take all "uncontroverted facts in the complaint…as true, and draw all reasonable inferences in favor of the party asserting jurisdiction." *Tandon v. Captain's Cove Marina*, 752 F.3d 239, 243 (2d Cir. 2014). If the defendant's proffered facts do not contradict the material complaint allegations, as is the case here, the plaintiff is entitled to rely solely on the complaint to oppose the motion to dismiss and it is not an error for a court to base its ruling solely on the complaint. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 58 (2d Cir. 2016). At the pleading stage, "standing allegations need not be crafted with precise detail, nor must plaintiff prove his allegations of injury." *Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("at the pleading stage, general factual allegations of injury … may suffice [to establish standing]")).

B. Johnson's Pleadings Establish Standing

Johnson's FAC far exceeds the three standing requirements. The NFLPA does not contest that Johnson met the third requirement -- that a favorable judicial decision could redress Johnson's injuries -- as doing so would be futile.

1. Johnson Suffered Injury in Fact

The NFLPA does not contest that Johnson has suffered injury. Rather, the NFLPA grossly mischaracterizes the nature and scope of Johnson's injuries in an attempt to break the connection between its misconduct and his injuries. The NFLPA incorrectly argues Johnson's injuries flowed solely from the erroneous Award. In doing so, the NFLPA cherry picks from Johnson's Prayer for Relief -- citing only subsections (c), (f), and (g) -- and disregarding (a), (b), (d), (e), (h), (i), and (j). *See* Doc. No. 109 at 12; *see also* Doc. No. 39 at Prayer for Relief.

The NFLPA also omitted the following underlined portion of subsection (f), in which Johnson seeks "damages [he] has suffered or will suffer as a result of Defendants' actions as described herein and the Award…" Doc. No. 39 at Prayer for Relief (emphasis added). As the full subsection (f) states, Johnson's injuries include more than just those resulting from the erroneous Award. Separate and apart from the Award, the NFLPA injured Johnson by violating its Duty of Fair Representation ("DFR") and the Labor Management Reporting and Disclosure Act ("LMRDA"), which required the NFLPA to provide Johnson a complete copy of the Policy upon request -- something it still has not done. Doc. No. 39 at ¶¶ 305-308. Indeed, Johnson has expended time, money, and resources seeking to enforce his LMRDA rights.

The NFLPA's withholding of the Policy's terms in violation of the LMRDA further injured Johnson by denying him the opportunity to evaluate fully his rights. *See Price v. Int'l Bhd. of Teamsters, etc.*, 457 F.2d 605, 609-610 (3d Cir. 1972). A plaintiff suffers an injury in fact when he fails to obtain information that must be disclosed pursuant to a statute. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998). This Court relied upon *Akins* to conclude, "a plaintiff suffers a sufficiently concrete injury to confer Article III standing when she is denied access to information that, in plaintiff's view, must be disclosed pursuant to a statute and when there is no reason to doubt that the information would help plaintiff within the meaning of the statute." *McFarlane v. First Unum Life Ins. Co.*, No. 16-CV-7806, 2017 WL 3495394, *7 (S.D.N.Y. Aug. 15, 2017) (internal citations omitted) (quoting *Akins*, 524 U.S. at 21); James W. Moore et al., *Moore's Federal Practice* § 101.40 (3d ed. 2015) ("plaintiff may be injured by a defendant's failure or refusal to disclose information that it is required by law to disclose and the disclosure of which would be helpful to the plaintiff"); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549-1550 (2016) (*citing Public Citizen v. United States Dep't of Justice*, 491 U.S. 440,

449 (1989) ("the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact," including where "failure to obtain information subject to disclosure under the Federal Advisory Committee Act 'constitutes a sufficiently distinct injury to provide standing to sue'").

The process by which the NFL disciplined Johnson relied on secret deviations from the Policy -- not the Policy's plain language. Despite Johnson's repeated requests, the NFLPA refused to provide him the alleged Policy deviations or "amendments." Doc. No. 39 at ¶¶ 306-311; Doc. No. 110-1 at ¶ 10. The FAC details these "amendments," which include, for example, effectively eliminating the neutral CFT position, allowing NFL-affiliated arbitrators, etc. Doc. No. 39 at ¶¶ 111-122. In short, the NFLPA denied Johnson the complete Policy to which he was entitled and the NFL disciplined him under Policy terms Johnson had never seen.[2]

Furthermore, the NFLPA's breach of its DFR hamstrung Johnson's ability to assert and defend his Policy rights causing him further injury. The express Policy terms granted Johnson certain protections (i.e., an unaffiliated arbitrator, CFT certification of test results, and the ability to challenge whether lab protocols were followed, etc.). A plaintiff suffers a concrete injury and suffers an ascertainable loss when he receives less than what he was promised. *Emilio v. Sprint Spectrum L.P.*, No. 11-CV-3041 (JPO), 2016 WL 3748482, *2 (S.D.N.Y. July 7, 2016) (*citing In re Bayer Corp*, 701 F. Supp. 2d 356, 377-78 (E.D.N.Y. 2010)). The NFLPA cooperated in implementing secret, unratified deviations from express Policy terms, injured Johnson by denying him the protections and procedures the Policy promised, and further injured Johnson by refusing to provide him with any of these purported deviations.

[2] The NFLPA refused to provide Johnson with the complete Policy knowing that the NFL also had refused to do so. *See* Doc. No. 39 at ¶¶ 310-311.

In a supreme irony, in the Ezekiel Elliot case the NFLPA has recently made an argument nearly identical to Johnson's arguments concerning standing, which is now squarely before this Court (*see* S.D.N.Y. Case No. 1:17-cv-06761-KPF) (standing exists where "Elliott's labor law and CBA rights to a fundamentally fair arbitration had already been breached"). *See* Exhibit 1 at 3102. For reasons only the NFLPA knows, a violation of Elliott's generalized "CBA rights" caused injury, but the violation of Johnson's express Policy rights did not. The NFLPA speaks to this Court with the same forked tongue with which it spoke to Johnson.

2. Johnson's Injuries Are Traceable to the NFLPA's Misconduct

When evaluating whether Johnson's injuries are fairly traceable to the NFLPA, the Court must consider all the injuries Johnson pled -- not just those the NFLPA selectively cited. The NFLPA's assertion that Johnson's injuries resulted only from the erroneous Award fails. In addition to the injuries flowing from the Award, Johnson specifically pled injuries arising from the bastardized arbitration process, which bore no resemblance to what the NFLPA promised Johnson through the express Policy terms Johnson and his fellow NFLPA members approved and that are directly traceable to the NFLPA's misconduct. Furthermore, Johnson's LMRDA injuries, which are unrelated to the Award, trace back directly to the NFLPA.

The NFLPA wrongly asserts that Article III standing requires an absolute causal connection between its conduct and the Award injuries. "Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1392, fn. 6 (2014) (emphasis added); *see also Rothstein v. UBS AG*, 708 F.3d 82, 92 (2d Cir. 2013) ("the fairly traceable element of Article III standing imposes a standard lower than proximate cause"); *Kacocha v. Nestle Purina Petcare Co.*, No. 15-CV-5489, 2016

WL 4367991, *8 (S.D.N.Y. Aug. 11, 2016) (*citing Carter*, 822 F.3d at 55) (the "causal connection element of Article III standing" is not "an onerous standard").

Moreover, a plaintiff does not lack standing "merely because [his] injury is an indirect product of the defendant's conduct." *Garelick v. Sullivan*, 987 F.2d 913, 919 (2d Cir. 1993). "[A] plaintiff can be directly injured by a misrepresentation even where a third party, and not the plaintiff … relied on it." *Lexmark*, 134 S. Ct. at 1391 (*citing Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 656 (2008)). In this case, the arbitrator relied on the NFLPA's false assertions regarding the existence of legitimate Policy amendments (e.g., the CFT certification requirement and minimum number of arbitrators provisions) to legitimize the process and his award. Doc. No. 39-2 at 1835, 1841.[3]

The following table traces the NFLPA's misconduct to some of Johnson's injuries:

The NFLPA's Misconduct	Resulting Injury to Johnson
Refused to assert Johnson's appeal rights and its attorney expressed that appealing would be like "burning money." Doc. No. 39 at ¶¶ 127-128.	Johnson had to retain outside counsel to assert his rights and only after he conducted his own investigation did an NFLPA attorney admit the merits of his defenses.
Refused to support Johnson's efforts to obtain the lab protocols applicable to his tests. Doc. No. 39 at ¶¶ 119, 287.	Absent the protocols, Johnson could not demonstrate the lab failed to follow them or tainted his specimen, as he suspected.[4]
Ignored express Policy terms regarding arbitrator appointment, competence, assignment, and selection. Doc. No. 39 at ¶¶ 116-118, 319.	Denied Johnson a properly appointed, seated, and unaffiliated arbitrator free of prohibited conflicts.
Failed to seek approval from its membership, as required by its Constitution, to modify the Policy. Doc. No. 39 at ¶¶ 111-22.	The NFLPA allowed the NFL to enforce unapproved, secret modifications to the Policy against Johnson to his detriment.

[3] In the Award, the arbitrator claimed he was "designated in accordance with the applicable rules of the [Policy]," despite knowing that the NFLPA and the NFL did not abide by the Policy's minimum number of arbitrator provisions. Doc. No. 39 at ¶ 153.

[4] Players have successfully appealed discipline based on deviations in the collection procedures and protocols. *See*, e.g., Richard Sherman (http://www.usatoday.com/story/sports/nfl/seahawks/2012/12/27/richard-sherman-seattle-seahawks-nfl-suspension/1794143/) (last visited 10/20/17).

The NFLPA's Misconduct	Resulting Injury to Johnson
Did not enforce the "neutral and independent" status of its agent the Independent Administrator, including refusing to obtain documents critical to Johnson's appeal from the Independent Administrator and provide them to Johnson. Doc. No. 39 at ¶¶ 133-134.	Without access to documents maintained by the Independent Administrator, Johnson could not evaluate or support his defenses or rebut documents relied on by the NFL at his appeal to support his discipline.
Issued an inaccurate statement to the media. Doc. No. 39 at ¶¶ 125-126, 287.	Damaged Johnson's reputation.
Refused to provide the alleged "side agreement" relating to the CFT and failed to ratify or notify its members of such an agreement.[5] Doc. No. 39 at ¶¶ 98, 120, 134.	No positive test and no valid discipline exist absent certification of the test results by the CFT per the Policy.
Privately advised Johnson it felt the Independent Administrator retained him in the Policy's reasonable cause testing program in violation of the Policy, but refused to voice that position on the record. Doc. No. 39 at ¶¶ 141-142.	The NFLPA's silence before the arbitrator enabled the NFL to assert that the NFLPA endorsed the discipline and that the NFL and the NFLPA amended the reasonable cause testing program.

As detailed above and outlined in Johnson's FAC, the NFLPA's misconduct directly contributed to the erroneous Award. Doc. No. 39 at ¶¶ 144, 277-303, 316-332. Certainly, genuine material issues of fact exist.

C. The NFLPA's Attempt to Hide Behind the Award Must Fail

The NFLPA mischaracterizes the law in an attempt to prop up its Rule 12(b)(1) arguments. First, the NFLPA asserts that Johnson's DFR claims fail because the arbitrator rejected Johnson's arguments regarding deviations from express Policy terms and, thus the erroneous Award vindicates the NFLPA's actions and omissions. However, the NFLPA nowhere refutes Johnson's claims that its misconduct tainted the Award. Doc. No. 109 at 16-17.

[5] The NFLPA refers to a purported "side agreement" with the NFL allowing the UCLA Laboratory director to fulfill the CFT duties. The NFLPA neither attached the "side agreement" nor provided evidence of ratification as its Constitution required. Doc. No. 109 at 24. Johnson repeatedly sought this document. Doc. No. 39 at ¶¶ 306-307. Whether the "side agreement" exists or not, the NFLPA had to submit any Policy amendments to its Board of Representatives for approval but, in violation of its Constitution, did not do so. Doc. No. 39 at ¶¶ 111-122.

Second, given Johnson's allegations against the Defendants and arbitrator, the NFLPA cannot rely on the tainted Award. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976); Doc. No. 39 at ¶¶ 202-263. A union's breach of its DFR relieves an employee of a requirement to settle disputes through grievance procedures. *Santos v. Dist. Counc. of New York City*, 547 F.2d 197, 202 (2d Cir. 1977) (*citing Hines*, 424 U.S. at 567). When the breach "seriously undermines the integrity of the [arbitral] process" it removes the bar of finality from the award. *Id.*; *see also Bowen v. USPS*, 459 U.S. 212, 223 (1983) (DFR breach removes the arbitral bar of finality because, in part, a contrary rule would prevent the employee's recovery).

Johnson raised the issues of arbitrator selection, the failure to appoint a minimum of three arbitrators, and the arbitrator assignment process during his appeal and requested information regarding each issue. Doc. No. 39 at ¶ 58; Doc. No. 110-13 at 10-11. Johnson also argued for that information in the discovery hearing and incorporated his arguments in his appeal. Doc. No. 52-6 at 2605, 2611-12; Doc. No. 52-4 at 2467. *See Akins*, 524 U.S. at 21; *McFarlane*, 2017 WL 3495394 at *7 (denial of access to information that must be disclosed pursuant to a statute that would help plaintiff is a concrete injury). Johnson pursued the arbitrator appointment issues and raised and incorporated his arguments at the arbitration, despite the fact the NFLPA, the NFL, and even the arbitrator himself refused to provide Johnson with information allowing him to effectively assert the defense. Doc. No. 39 at ¶ 193; Doc. 52-9 at 2643.[6]

By multiple requests for information, Johnson attempted to determine whether the arbitrator was properly seated. The NFL, the arbitrator, and, in violation of its DFR, the NFLPA stymied his efforts. Doc. No. 39 at ¶¶ 58, 193, 214. Regardless, a labor arbitrator does not have

[6] For example, Johnson only learned after his appeal concluded that the arbitrator was affiliated with the NFL due to his service as an arbitrator under the NFL Policy and Program on Substances of Abuse 2015 ("SOA Policy"). *See* Doc. No. 39 at ¶ 175.

the authority to determine his own jurisdiction. *See AT&T Techs. v. Comm. Wkrs. of Am.*, 475 U.S. 643, 651 (1986); *Cargill Rice, Inc. v. Empresa Necaraguense Dealimentos Basicos*, 25 F.3d 223, 226 (4th Cir. 1993); *Int'l Ass'n of Machinists & Aerospace Wkrs, Prog. Lodge No. 1000 v. General Elec. Co.*, 865 F.2d 902, 904 (7th Cir. 1989). Thus, the NFLPA's attempt to attack Johnson based on the Award of an arbitrator who determined his own jurisdiction must fail.

Furthermore, the NFLPA grossly miscasts Johnson's counsel's statement regarding the arbitrator's "qualifications." Doc. No. 109 at 9. Undermining the NFLPA's assertion that Johnson "waived" objections to the arbitrator's bias by acknowledging his objective "qualifications" is the court-recognized distinction between an objective "qualification" and "impartiality." *See Nationwide v. Home Ins. Co.*, 429 F.3d 640, 646, fn. 8 (6th Cir. 2005) (*citing Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983) (describing the distinction between an arbitrator's "impartiality" and "expertise")).

In reality, the arbitrator's available credentials indicated the experience to hear the dispute. However, his failure to disclose his multiple conflicts and ongoing affiliations that the Policy prohibited is evidence of his bias and denied Johnson the ability to meaningfully evaluate and object to his service. Doc. No. 39 at ¶¶ 175, 178-201. Where, as in the Policy (*see* Doc. No. 39-1 at 1796), there is a specific standard for arbitrator impartiality, the Court must decide whether non-compliance with that standard requires a finding of "evident partiality." *Scandinavian Reinsur. Co., Ltd. v. St. Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 77, fn. 22 (2d Cir. 2012); *see also First Interreg. Equity Corp. v. Haughton*, 842 F. Supp. 105, 109 (S.D.N.Y. 1994) (determining arbitrator bias requires a fact-bound inquiry); *NHL Players' Assn. v. Bettman*, No. 93 Civ. 5769, 1994 WL 38130, *3 (S.D.N.Y Feb. 4, 1994) (prior agreement to a particular arbitrator "will not bar a challenge to that arbitrator's status based on newly discovered

facts that demonstrate an unacceptable degree of bias or the appearance of evident partiality") (*citing Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972)).

As Johnson pled, the NFLPA "amended" express Policy terms guaranteeing his rights without its members' approval, as its Constitution required, and aided the NFL's deviations from express Policy terms. The NFLPA denied Johnson vital information and its actions and omissions struck at the heart of the Policy's guarantee of transparency and fair adjudication. Doc. No. 39-1 at 1785. The NFLPA's DFR breaches also denied Johnson a legitimate arbitrator. Johnson's pleadings demonstrate his injuries are fairly traceable to the NFLPA's misconduct.

D. Johnson's Injuries Are Ongoing and Impending

Standing under the Declaratory Judgment Act requires a plaintiff to "show a likelihood that he … will be injured in the future." *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 284 (2d. Cir. 2004) (*citing Deshawn E. ex rel. Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 2004)). Johnson specifically alleged future damages flowing from the NFLPA's misconduct. *See* Doc. No. 39 at ¶¶ 342-343. Johnson also asserted the following, ongoing injuries: improper continuation in the reasonable cause testing program; improper placement at an elevated Policy discipline stage; and forfeiture of contractual guarantees. Doc. No. 39 at Prayer for Relief. Continuation in the reasonable cause testing program subjects him to increased testing and exposure to more sever discipline. Doc. No. 39-1 at ¶¶ 1789-1790. With every reasonable cause test, Johnson is injured again. Also, without his contractual guarantees, Johnson can be cut at any time, forfeiting all compensation. Johnson's injuries exceed the Declaratory Judgment Act pleading requirements. *See Carter*, 822 F.3d at 55 ("[A] liability, including a contingent liability, may be a cognizable legal injury" sufficient for Article III standing).

II. JOHNSON SUFFICIENTLY STATED CLAIMS AGAINST THE NFLPA

A. Standard of Review -- Rule 12(b)(6)

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (*quoting Twombly*, 550 U.S. at 570); *Jiggetts v. Local 32BJ SEIU*, No. 09 Civ. 7243, 2010 WL 1558565, *3 (S.D.N.Y. Feb. 24, 2010); *see also* Fed. R. Civ. P. 8(a)(2). The factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. As the Second Circuit has instructed:

> To warrant dismissal of a complaint for "failure to state a claim upon which relief can be granted," it must "appear[] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46, (1957); *see also Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974) ("[I]t may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.". . . . "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. . . ."), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183, (1984).

Util. Metal Research, Inc. v. Generac Power Sys., 179 F. App'x 795, 797 (2d Cir. 2006). At the pleading stage, the standard is one of plausibility, not absolute guilt. *See Iqbal*, 556 U.S. at 679 ("[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief").

B. Johnson Sufficiently Plead DFR Claims

The DFR exists "to allow a single labor organization to represent collectively the interests of *all employees within a unit*." *Beachum v. AWISCO New York and Local 810 Int'l Bhd. of Teamsters*, 785 F. Supp. 2d 84, 100, fn. 9 (S.D.N.Y. 2011) (Sullivan, J.) (emphasis in the original). The DFR was designed to address the "primary concern … that individual employees not be deprived of all effective means of protecting their own interests." *Lewis v. Tuscan Dairy*

Farms, 25 F.3d 1138, 1142 (2d Cir. 1994) (*citing Aguinaga v. Unt'd Food & Comm. Wkrs. Int'l Union*, 993 F.2d 1463, 1471 (10th Cir. 1993)).

A union owes its employees "a duty to represent them adequately as well as honestly and in good faith." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 75 (1991) (emphasis added). A union must "exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id*. at 76 (emphasis added). Regardless of whether a union member's DFR claims stand-alone or are part of hybrid Section 301 claims,[7] a union breaches its DFR when its conduct toward "any member" becomes "arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

The DFR applies to the negotiation, enforcement, and administration of a collectively bargained agreement. *Spellacy v. Airline Pilots Assn. Int'l*, 156 F.3d 120, 126 (2d Cir. 1998) (*citing Ford*, 345 U.S. at 336, *Vaca*, 386 U.S. at 177). A union's waiver of a member's rights or privileges is "conditioned on the necessity that 'the union fulfill[] its [DFR].'" *Legal Aid Soc'y v. City of New York*, 114 F. Supp. 2d 204, 227 (S.D.N.Y. 2000) (quoting *Plumbers & Pipefitters Local Union No. 520 v. NLRB*, 955 F.2d 744, 751 (D.C. Cir. 1992) (*citing Met. Ed. Co. v. NLRB*, 460 U.S. 693, 705-07 (1983)). "A waiver 'is ordinarily an intentional relinquishment or abandonment of a known right or privilege.'" *Doe v. Marsh*, 105 F.3d 106, 111 (2d Cir. 1997) (emphasis added) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

[7] The NFLPA is wrong; Johnson's DFR claims do not require a breach of contract claim against the NFL. "Not all allegations that a union has breached the [DFR] are constituent parts of a hybrid claim, and some may provide the basis for an independent [DFR] claim." *Acosta v. Potter*, 410 F. Supp. 2d 298, 309 (S.D.N.Y. 2006) (*citing White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559-62 (6th Cir. 1990)); *see also Tuscan*, 25 F.3d at 1145 (a breach of contract by the employer is not a jurisdictional prerequisite to an action against a union for breach of its DFR) (*citing Breininger v. Sheet Metal Wkrs. Int'l Ass'n*, 493 U.S. 67, 80-84 (1989)).

The FAC details the many instances in which the NFLPA violated its DFR by acting arbitrarily, discriminatorily, and in bad faith – e.g., violating its Constitution and the LMRDA. *See* Doc. No. 39 at ¶¶ 98-99, 111-122, 277-303, 316-332. The NFLPA glosses over or ignores these averments, but, at the pleading stage, the Court must accept them as true and should dismiss the NFLPA's Rule 12(b)(6) motion.

1. Johnson Pled Sufficient, Uncontroverted Facts to Demonstrate the NFLPA Breached its DFR

Courts evaluate DFR breach claims, which are fact intensive, on a case-by-case basis. *See Ryan v. New York Newspaper Printing Pressmen's Union*, 590 F.2d 451, 455 (2d Cir. 1979); *see also Spellacy*, 156 F.3d at 129 (quoting *Air Line Pilots Ass'n*, 499 U.S. at 67) (union conduct is arbitrary if, in light of the factual and legal landscape at the time of its actions, the union's behavior is "so far outside a wide range of reasonableness" as to be irrational) (internal quotes omitted) (emphasis added). The Second Circuit has observed that there is "some dispute" concerning whether the determination as to a union's breach of its DFR "resolves a question of fact or a mixed question of law and fact" but has "assumed, without explicitly deciding, that [the determination as to a union's breach of its DFR] is a question of fact." *White v. White Rose Food*, 237 F.3d 174, 178, fn.2 (2d Cir. 2001); *see also Santo v. Laborers' Int'l Union*, No. 07 CV 4735, 2009 U.S. Dist. LEXIS 40608, *26 (S.D.N.Y. Mar. 27, 2009) (whether union violated its DFR raised "factual issues" that "should not be resolved on a motion to dismiss").[8] Either way, the determination is, at least in part, fact-based and inappropriate for a motion to dismiss.

a. The NFLPA Violated Its Constitution

Johnson detailed numerous irrational deviations from the Policy that the NFLPA allowed. *See* Doc. No. 39 at ¶¶ 113-121. In each instance, the NFLPA either participated in or allowed

[8] Johnson attaches the *Santo* decision as Exhibit 2.

the NFL to deviate from express Policy terms that provided substantive protections to Johnson. The NFLPA's Constitution required the NFLPA to seek approval of its membership for each of these amendments, which it did not do. Doc. No. 39 at ¶¶ 113-122.

Absent justification or excuse, "a union's negligent failure to take a basic and required step unrelated to the merits of the grievance, is a clear example of arbitrary and perfunctory conduct, which amounts to unfair representation." *Caputo v. Nat'l Ass'n of Letter Carriers*, 730 F. Supp. 1221, 1227 (E.D.N.Y. 1990) (quoting *Ruzicka v. Gen. Motors Corp.*, 649 F.2d 1207, 1211 (6th Cir. 1981)). "*Unexplained union inaction which substantially prejudices a member's grievance could amount to the type of arbitrary conduct which evidences unfair representation*." *Caputo*, 730 F. Supp. at 1227 (emphasis in original) (quoting *Ruzicka*, 649 F.2d at 1211)).

The NFLPA knew the arbitrator's appointment violated the Policy, but either ignored or improperly waived his conflicts. *See* Doc. No. 39 at ¶ 289. By allowing the arbitrator to serve as a Policy arbitrator, the NFLPA voided the Policy's terms to Johnson's detriment and in violation of its Constitution. *See* Doc. No. 39 at ¶¶ 316-332. Indeed, the whole point of removing the NFL's exclusive right to select arbitrators was to ensure that players received the benefit of a neutral arbitrator. *See* Doc. No. 109 at 9; *see* also Doc. No. 39 at ¶ 322 (per the NFLPA, this change was "a significant achievement for the players and their Union"). Similarly, the NFLPA eliminated the neutral CFT certification of Policy tests without seeking the required ratification. Doc. No. 39 at ¶¶ 111-122. The NFLPA's "deviations" from express Policy terms, in violation of its Constitution, are arbitrary, unreasonable, and in bad faith. Johnson requested information regarding the deviations but the NFLPA refused to provide it. Doc. No. 39 at ¶¶ 122, 310, 312.

A union violates its DFR if its constitution or bylaws require a ratification vote for collectively bargained terms and the union does not hold a vote. *Deboles v. Trans World*

Airlines, Inc., 552 F.2d 1005, 1018 (3d Cir. 1977); *White*, 237 F.3d at 182 (accord) (*citing Deboles*, 552 F.2d at 1018); *see also Kozera v. IBEW*, 892 F. Supp. 536, 544 (S.D.N.Y. 1995) (Court denied summary judgment to a union on a DFR claim alleging the union negotiated and implemented revised contract terms without member approval, as required by union's constitution). In *Aguinaga*, the union entered a secret pact allowing the employer to violate the contract, which, "not only failed to protect Plaintiffs' interests, it bartered away Plaintiffs' means of protecting themselves and left Plaintiffs without representation." 993 F.2d at 1471. The Second Circuit confirms the law's "powerful condemnation" of secret employer-union agreements. *Tuscan*, 25 F.3d at 1144.

"[T]here is an important distinction between a negotiated modification of an agreement's terms and an unstated 'modification' intended to apply only to selected individuals: we call the latter a 'breach.'" *Tuscan*, 25 F.3d at 1143 (union breached its DFR by entering into a modification without obtaining approval and ratification as its bylaws required) (quoting *Bennett v. Local Union No. 66*, 958 F.2d 1429, 1435 (7th Cir. 1992)). The NFLPA refuses to explain or address its disregard of its Constitution. The NFLPA's disregard and other inexplicable decisions made without a rational basis are arbitrary and actionable DFR breaches. *Caputo*, 730 F. Supp. at 1226 (*citing Jones v. Trans World Airlines, Inc.*, 495 F.2d 790 (2d Cir. 1974)).

b. The NFLPA Failed to Investigate Johnson's Discipline

NFLPA attorneys acted on behalf of the NFLPA (Doc. No. 39 at ¶¶ 127-142) and this Court should judge the NFLPA's conduct based upon the higher standard expected of attorneys:

> The standard to be applied to union advocacy in grievance proceedings must be governed by the climate in which it functions. The perimeters of the minimally acceptable conduct cannot be too lax, or there will not be an appropriate safeguard for the union member whose important contractual rights are entrusted to and dependent upon the union's efforts in his behalf. On the other hand, to hold lay union representatives to the demanding tests applied to a trained trial lawyer

> would defeat the aims of informality and speedy resolution contemplated by labor-management grievance agreements.

Caputo, 730 F. Supp. at 1231 (quoting *Findley v. Jones Motor Freight*, 639 F.2d 953, 958 (3d Cir. 1981)); *see also Caputo*, 730 F. Supp. at 1232 ("the '[DFR] was clearly not intended to impose on union officials who are laymen and not lawyers, a standard akin to professional malpractice'") (*citing Dober v. Roadway Exp., Inc.*, 707 F.2d 292, 295 (7th Cir. 1983)).

The NFLPA attorneys conducted no independent investigation and actually tried to talk Johnson out of appealing his discipline (*see* Doc. No. 39 at ¶ 279) only later to tell him his defenses had merit (*see* Doc. No. 39 at ¶ 141). In fact, the NFLPA attorneys did not bother to review Johnson's "positive" test results prior to the close of Johnson's five-day appeal period. *See* Doc. No. 39 at ¶ 288. Despite Johnson's request, the NFLPA would not even "affirmatively state its support for Johnson during the October 4, 2016 hearing…" Doc. No. 39 at ¶ 295. When taken together, the NFLPA attorneys' actions and omissions breached the NFLPA's DFR:

> [a]bitrary conduct amounting to a [DFR] breach is not limited to intentional conduct but may include acts of omission which, while not calculated to harm union members, may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary.

NLRB v. Local 282, Int'l Bhd. of Teamsters, 740 F.2d 141, 147 (2d Cir. 1984) (quoting *Robesky v. Qantas Empire Airways*, 573 F.2d 1082, 1089-90 (9th Cir. 1978) (internal quotes omitted)).

c. The NFLPA Refused to Provide Johnson with Documents

A DFR breach can occur as the result of union non-disclosure of material facts to members during collective bargaining. *Gregory v. Amer. Guild of Musical Artists*, No. 91 Civ. 6751, 1993 WL 179110, *3 (S.D.N.Y. May 24, 1993); *see also Matos v. Aeronaves de Mexico, S.A.*, 584 F. Supp 933, 938 (S.D.N.Y. 1982). Furthermore, "an act or failure to act on the part of the union may be egregious (more than just negligent) so as to constitute arbitrary conduct for

failure to transmit vital information to the grievant." *Sparks v. Abe May Packing Co.*, 884 F.2d 1393, *3 (6th Cir. 1989) (emphasis added).[9]

In addition to not investigating Johnson's appeal, the NFLPA refused to provide him sufficient materials to investigate and defend his claims on his own. *See* Doc. No. 39 at ¶ 278. The NFLPA admitted Johnson should not have been subject to reasonable cause testing at the time of his "positive" test. Doc. No. 39 at ¶ 141. However, the NFLPA's failure to enforce the reasonable cause testing terms and assist Johnson in obtaining his testing history, in the NFLPA's agent's possession, denied Johnson the ability to fully assert that defense. The FAC includes a litany of items the NFLPA arbitrarily withheld from Johnson, including denying him a complete copy of the Policy. *See*, e.g., Doc. No. 39 at ¶¶ 131-134, 298, 310.

The NFLPA misleads this Court as to the effect of its refusal to provide Johnson with critical information on the arbitration process. In *Nieves v. Dist. Council 37 AFSCME*, No. 04 Civ. 8181 (RJS), 2009 WL 4281454 (S.D.N.Y. Nov. 24, 2009) (Sullivan, J.), the facts demonstrated the union attempted to obtain the documents its member requested, but the documents did not exist, and the arbitrator did not rely on the information to render his decision. *Id.* at **11-12. Here, the NFLPA refused to provide a number of existing documents (e.g., the "amendments" to the Policy, Johnson's testing history and the lab protocols in possession of its

[9] The National Labor Relations Board ("NLRB") has long held that unions breach the DFR by refusing members discipline-related information. *Caravan Knight*, 362 NLRB No. 196, slip op. at 5-6 (Aug. 27, 2015) (failed to provide a union statement); *USPS*, 362 NLRB No. 103, slip op. at 6 (May 29, 2015) (failed to provide the contract); *Teamsters Union No. 200*, 357 NLRB 1844, 1862 (2011) (failed to provide job referral lists, rules, policies, and procedure notices); *Letter Carriers Local 3825*, 333 NLRB 343, 353 (2001) (failed to provide other employee grievances documents); *Nat'l Assoc. of Letter Carriers*, 328 NLRB 952, 952 (1999) (failed to provide employee grievance file); *Letter Carriers Branch 529*, 319 NLRB 879, 881-82 (1995) (failed to provide grievance file); and *Carpenters Local 35*, 317 NLRB 18,19-22 (1995) (failed to provide job referral documents because employee had filed a grievance).

agents). The missing documents were germane to the arbitrator's Award. The NFLPA's citation to this Court's decision in *Nieves* is inapposite.

The NFLPA also miscast the *Bejjani v. Manhattan Sheraton Corp.*, No. 12 Civ. 6618, 2013 WL 3237845 (S.D.N.Y. June 27, 2013) decision. In *Bejjani*, this Court determined that the "side agreement" at issue "did not secretly destroy or abrogate any 'unambiguous contractual entitlement'" and was therefore not the basis for a DFR claim. *Id.* at *10 (*citing Spellacy*, 156 F.3d at 129). Here, Johnson alleges that the NFLPA's purported side agreements voided express Policy provisions that were directly applicable to his discipline and the Award. In the end, the NFLPA denied Johnson the complete Policy terms and information in its possession or control that were directly relevant to his defenses. Contrary to the NFLPA's cited authority, the Award relies on issues that likely would have been resolved differently had the NFLPA provided Johnson with these documents.

d. The NFLPA Colluded with the NFL and Retaliated against Johnson

In *Desrosiers v. American Cyanamid Co.*, the Second Circuit reversed the trial court's dismissal of an employee's claims of breach of a labor contract because of union and employer collusion. 377 F.2d 864, 866 (2d Cir. 1967). The plaintiff alleged the employer breached the contract "with the knowledge, consent and connivance of the defendant Union and was part of a conspiracy between the defendants to deprive the plaintiff of his rights under the agreement." *Id.* at 866, 870. Viewing the allegations in the light most favorable to plaintiff, the court held:

> [The allegations] plainly are sufficient to charge that the Union acted arbitrarily and in bad faith and thus breached its [DFR] within the ambit of [*Vaca*]. Indeed, these allegations go further and charge, as in [*Hiller v. Liquor Salesmen's Union Local No. 2*, 338 F2d 778 (2d Cir. 1964)] that the employer and the union acted in collusion to deprive [plaintiff] of his rights under the agreement.

Id. at 870-71 (internal citations omitted) (complaint sufficient to withstand "motion to dismiss").

When a union has caused or participated in the employer's underlying wrong, it is held jointly and severally liable for the employee's loss. *Baskin v. Hawley*, 807 F.2d 1120, 1131 (2d Cir. 1986) (finding that the union breached its DFR by not requiring the employer to comply with collective bargaining agreement terms as to an employee's benefits). "Smoking gun" evidence of a conspiracy is hard to come by at the pleading stage. *Sonterra Cap. Master Fund Ltd. v. Credit Suisse Grp. AG*, No. 1:15-cv-00871, 2017 WL 4250480, *17 (S.D.N.Y. Sept. 25, 2017) (quoting *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013)). A plaintiff is not required to demonstrate that allegations of collusion are more likely than not true at the pleading stage, as would be required at later litigation stages (i.e., defense of a motion for summary judgment or at trial). *Sonterra*, 2017 WL 4250480 at *17 (*citing Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 184 (2d Cir. 2012)).

The NFLPA's conclusory assertions that there are no grounds upon which Johnson can demonstrate retaliation or collusion ring hollow. A review of the hearing transcripts (Doc. No. 52-4 and 52-6) demonstrates that multiple NFLPA attorneys attended each hearing. Not one substantively contributed to Johnson's appeal. During the discovery hearing, Johnson explained to the arbitrator that the NFLPA refused to provide him information and told him to get it from the NFL. Doc. No. 39 ¶ 311; Doc. No. 52-6 at 2607-2608. The NFLPA's dumbstruck attorneys neither denied Johnson's statement nor supported his request for the information from the NFL.

Johnson's specific allegations demonstrate that the NFLPA breached its DFR by actively facilitating the NFL's violations of express Policy terms and then refusing to support Johnson's appeal. Doc. No. 39 at ¶¶ 95-99, 212-218, 280-286. As to "retaliation," Johnson pled specific facts demonstrating his public dispute with the NFLPA regarding its misconduct (Doc. No. 39 at ¶¶ 123-126), which may have motivated Defendants' collusion. Johnson also averred that the

NFL wanted to discuss with the NFLPA the fact that "Johnson [was] less than thrilled with the NFLPA" and proposed that the two discuss his appeal. Doc. No. 39 at ¶¶ 127-129.

The NFLPA's refusal to inform Johnson of the Policy's terms evidences intent to conceal its misconduct allowing un-ratified secret "amendments." The NFLPA also was upset by the increased work Johnson's appeal created and his challenge to the NFLPA's Constitutional violations. Johnson challenged the status quo -- a corrupt Policy -- and the NFLPA took illegal measures to ensure his challenge failed. *See* Doc. No. 39 at ¶¶ 111-122, 287, 343. The NFLPA and the NFL should be held jointly and severally liable for Johnson's damages and attorneys' fees, as they colluded in breaching the Policy. *See Lewis v. Whelan*, 99 F.3d 542, 545 (2d Cir. 1996) (*citing Bennett v. Local Union No. 66*, 958 F.2d 1429, 1440-41 (7th Cir. 1992) (holding an employer and a union liable when each party played an active role in the other's breach)); *see also Allen v. Allied Plant Maintenance Co. of Tenn.*, 881 F.2d 291, 298 (6th Cir. 1989) (employer and union jointly and severally liable where they colluded to pick a biased arbitrator).

2. The NFLPA's Misconduct Caused the Arbitration Process to Malfunction and Substantially Contributed to the Erroneous Award

After a plaintiff establishes that a union's actions were sufficiently arbitrary, discriminatory, or in bad faith, he then must demonstrate a "causal connection between the union's wrongful conduct and [plaintiff's] injuries." *Spellacy*, 156 F.3d at 126. A union breaches its DFR when its actions or omissions cause "the grievance procedure to malfunction resulting in an increase in the employee's damages." *Bowen v. USPS*, 459 U.S. 212, 223 (1983).

The NFLPA's attempt to distract this Court by chastising Johnson's conduct or arguing the merits of his arbitration must fail. As Johnson pled, the NFLPA undermined and cooperated with the NFL's efforts to undermine express Policy terms guaranteeing protections for Johnson. The absence of those protections -- a properly appointed and unaffiliated arbitrator, certification

of his test results by a neutral CFT, and access to critical documents like the lab protocols or even his own tests -- denied Johnson the transparency and fair adjudication the Policy promised him and substantially contributed to the erroneous Award.

C. Johnson Sufficiently Pled a LMRDA Claim

The LMRDA requires unions:

> to forward a copy of each collective bargaining agreement made by such labor organization with any employer to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement.

29 U.S.C. § 414. Naturally, the union must provide the entirety of any collective bargaining agreement, including all side letters, amendments, etc. *See* Exhibit 3 (excerpts from U.S. Dept. of Labor Office of Labor-Management Standards Interpretative Manual) at § 110.300 ("any subsequent agreement or amendment, oral or written, which modifies the basic agreement becomes a part of the collective bargaining agreement"). Johnson requested a complete copy of the Policy, and the NFLPA violated the LMRDA by refusing to provide it to him. *See* Doc. No. 39 at ¶¶ 304-315. Specifically, the NFLPA "refused to share with Johnson…purported modifications to the collectively bargained 2015 Policy." Doc. No. 39 at ¶ 308. This alone is a violation of the LMRDA. The NFLPA provides a website, which it claims includes the Policy (Doc. No. 109 at 28, fn. 12), but that link is to a newer policy (not the Policy applicable here), and has never included the secret "amendments" that were applied to Johnson's arbitration process (*see* Doc. No. 39 at ¶¶ 111-122).

The NFLPA miscasts the *Summerville* decision to suggest it was not required to provide Johnson with Policy modifications. In *Summerville*, a union member requested "the Articles that will appear in the new agreement" not the provisions of the current labor contract. *Summerville v. Local 77*, 369 F. Supp. 2d 648, 653-654 (M.D.N.C. 2005). Here, Johnson claims the NFLPA

refused to provide him the terms of the then existing Policy. Furthermore, in *Summerville*, the union provided "the Articles" the union member requested. *Id*. at 655.[10] Here, Johnson still does not have a complete copy of the Policy terms. Doc. No. 39 at ¶ 313; Doc. No. 110-1 at ¶ 10. How can Johnson adhere to a policy or be disciplined under a policy he does not have?[11]

Likewise, the NFLPA's reliance on *Acosta v. Local Union 26, Unite Here*, No. CV 16-10396-GAO, 2017 WL 1731690 (D. Mass. May 3, 2017) is misguided. It is beyond dispute that Johnson directly was affected by secret "amendments" to the Policy. Accordingly, Johnson has stated ample grounds for each of his claims, without the benefit of discovery, and this Court should deny the NFLPA's Rule 12(b)(6) motion.

CONCLUSION

Johnson respectfully requests that the Court deny Defendant NFLPA's Motion to Dismiss in its entirety.

Respectfully submitted,

/s/ Stephen S. Zashin

Stephen S. Zashin (NY #4594305), ssz@zrlaw.com
Patrick J. Hoban (OH #0079794), pjh@zrlaw.com*
David R. Vance (OH #0083842), drv@zrlaw.com*
Zashin & Rich Co., L.P.A.
950 Main Avenue, 4th Floor
Cleveland, OH 44113
Telephone: (216) 696-4441
Facsimile: (216) 696-1618
** admitted pro hac vice*

Attorneys for Plaintiff

[10] In the alternative, if the NFLPA suggests that it did not have to provide Johnson with the modifications because they had "not yet been incorporated" into the Policy (Doc. No. 109 at 28), then the NFLPA admits the NFL, with the NFLPA's cooperation, enforced invalid Policy provisions to discipline Johnson.

[11] Johnson's LMRDA claim, while related to his other claims, is a stand-alone claim. The harm the NFLPA's violation caused Johnson need not relate to his arbitration to be actionable.

CERTIFICATE OF SERVICE

The undersigned certifies that on October 25, 2017 the foregoing was filed using the Court's CM/ECF system. All parties and counsel of record will receive notice and service of this document through the Court's CM/ECF electronic filing system.

/s/ Stephen S. Zashin
Stephen S. Zashin (NY #4594305)
ssz@zrlaw.com
Patrick J. Hoban (OH #0079794)*
pjh@zrlaw.com
David R. Vance (OH #0083842)*
drv@zrlaw.com
Zashin & Rich Co., L.P.A.
950 Main Avenue, 4th Floor
Cleveland, OH 44113
Telephone: (216) 696-4441
Facsimile: (216) 696-1618
** admitted pro hac vice*

Attorneys for Plaintiff